A

Sabastine Ifeanyi Ozochiama v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–55–03 OF 2015
TENGKU MAIMUN, VARGHESE GEORGE AND ABDUL KARIM ABDUL JALIL JJCA
5 OCTOBER 2016

C

Criminal Law — Dangerous Drugs — Trafficking — Appellant convicted and sentenced to death for offence of trafficking in dangerous drugs — Appellant appealed against conviction and sentence — Whether there was doubt as to identity of drug exhibits — Whether there was break in chain of evidence — Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a) and (2)

D

The appellant was charge with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39B(2) of the same. Based on the evidence of the respondent's witnesses ie SP3, SP4 and SP8, the appellant had excreted a total of 83 capsules and the capsules were later handed over to investigating officer ('SP10'). SP10 sent the capsules to the chemist ('SP5') who confirmed that the capsules contained 614.36g of methamphetamine. The appellant's defence was that, he was asked by his friend Obina to swallow the capsules which allegedly contained chemicals used for treatment of hair loss. The appellant contended that, when he was arrested, he told the police about Obina but the police refused to investigate further. At the end of the defence case, the trial judge found that the appellant had failed to rebut the presumption of possession under s 37(d) of the DDA and failed to raise a reasonable doubt on the prosecution's case. The trial judge thus convicted and sentenced the accused to death, hence this appeal. The appellant's ground of appeal was on the identity of the drug exhibits. The appellant submitted that based on the evidence of SP3, SP4 and SP8, the total weight of the drugs in the 83 capsules was 1,357g whereas SP5 testified that the weight of the capsules was 1,381.1244g. It was further submitted that from the evidence of SP10, the drugs were recovered from the appellant on 26 August 2011 whereas the date of the charge was 27 August 2011, this raised a doubt as to whether the drugs exhibits in the instant case were mixed up with exhibits from another case.

E F G H

I

Held, dismissing the appeal and affirming the conviction and sentence of the High Court:

(1) Based on the evidence, the drug exhibits were handed over to SP10 who confirmed receipt of the capsules and placed the capsules inside plastic

packets marked as Z1, Z2, Z3, Z4, Z5, Z6 and Z7. The drug exhibits were kept by SP10 in his cabinet which was only accessible by him. SP10 then sent the drug exhibits in a sealed PDRM box marked ZL to SP5. SP5 confirmed receipt of the box marked ZL and also confirmed that capsules in Z1 until Z7 contained methamphetamine totaling 614.36g. Thus, there was no break in the handling or custody of the exhibits as to amount to a break in the chain of evidence (see paras 25–32).

(2) The documentary evidence, namely the search lists, the police reports and the hand over lists all bore date of 27 August 2011 and 28 August 2011 and none had the date of 26 August 2012. The date of 26 August 2011 was not mentioned by SP10 but it was in the question posed by learned counsel. There was no basis to find that the drug exhibits analysed by the chemist and which formed the subject matter of the charge against the appellant were not the same ones that were excreted by him. On the totality of the evidence, the respondent had proved beyond reasonable doubt that the appellant had mens rea possession of, and was trafficking in the dangerous drugs under s 2 of the DDA (see paras 34–35).

[Bahasa Malaysia summary

Perayu dipertuduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39B(2) Akta yang sama. Berdasarkan keterangan saksi-saksi responden iaitu SP3, SP4 dan SP8, perayu telah mengeluarkan sebanyak 83 kapsul dan kapsul-kapsul tersebut kemudiannya diserahkan kepada pegawai penyiasat ('SP10'). SP10 menghantar kapsul kepada ahli kimia ('SP5') yang mengesahkan bahawa kapsul-kapsul tersebut mengandungi 614.36g methamphetamine. Pembelaan perayu adalah bahawa, dia telah diminta oleh rakannya Obina untuk menelan kapsul-kapsul yang dikatakan mengandungi bahan kimia yang digunakan untuk rawatan keguguran rambut. Perayu berhujah bahawa, apabila dia ditangkap, dia memberitahu polis mengenai Obina tetapi polis enggan menyiasat dengan lebih lanjut. Pada akhir kes pembelaan, hakim perbicaraan mendapati bahawa perayu gagal mematahkan anggapan milikan di bawah s 37(d) ADB dan gagal untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Hakim perbicaraan dengan itu, menyabitkan dan menghukum tertuduh dengan hukuman mati, oleh itu rayuan ini dibuat. Alasan rayuan perayu adalah berhubung identiti ekshibit dadah. Perayu berhujah bahawa berdasarkan kepada keterangan SP3, SP4 dan SP8, jumlah berat dadah dalam 83 kapsul adalah 1,357g manakala SP5 memberi keterangan bahawa berat kapsul adalah 1,381.1244g. Perayu selanjutnya berhujah bahawa dari keterangan SP10, dadah tersebut didapati daripada perayu pada 26 Ogos 2011 manakala tarikh pertuduhan adalah 27 Ogos 2011, ini menimbulkan keraguan sama ada ekshibit dadah dalam kes ini telah bercampur dengan ekshibit-ekshibit daripada kes lain.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Berdasarkan keterangan, ekshibit dadah diserahkan kepada SP10 yang mengesahkan penerimaan kapsul-kapsul dan meletakkan kapsul-kapsul tersebut di dalam paket plastik yang ditanda sebagai Z1, Z2, Z3, Z4, Z5, Z6 dan Z7. Ekshibit dadah telah disimpan oleh SP10 dalam kabinetnya yang hanya boleh diakses oleh beliau. SP10 kemudiannya menghantar ekshibit dadah dalam kotak PDRM yang bertutup ditanda ZL kepada SP5. SP5 mengesahkan menerima kotak bertanda ZL dan juga mengesahkan bahawa kapsul-kapsul pada Z1 sehingga Z7 mengandungi methamphetamine berjumlah 614.36g. Oleh itu, tiada pecahan dalam pengendalian atau jagaan ekshibit yang terjumlah kepada pecahan dalam rantaian keterangan (lihat perenggan 25–32).

(2) Bukti dokumentari, iaitu senarai carian, laporan polis dan senarai serahan tangan menyenaraikan semua tarikh iaitu 27 Ogos 2011 dan 28 Ogos 2011 dan tiada satupun mempunyai tarikh 26 Ogos 2012. Tarikh 26 Ogos 2011 tidak disebut oleh SP10 tetapi ada dalam soalan yang dikemukakan oleh peguam terpelajar. Tiada asas untuk mendapati bahawa ekshibit dadah yang dianalisis oleh ahli kimia dan membentuk perkara subjek pertuduhan terhadap perayu tidak sama dengan apa yang dikeluarkan olehnya. Pada keseluruhan keterangan, responden telah membuktikan melampaui keraguan munasabah bahawa perayu mempunyai milikan mens rea, dan telah mengedar dadah berbahaya di bawah s 2 ADB (lihat perenggan 34–35).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), First Schedule

Appeal from: Criminal Trial No 45A-10–01 of 2012 (High Court, Shah Alam)

Hasshahari bin Johari Mawi (Hasshahari & Partners) for the appellant.
Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This was an appeal by the accused ('the appellant') against the conviction and sentence of the High Court on the following charge:

> Bahawa kamu pada 27 Ogos 2011 jam lebih kurang 6.00 pagi hingga 28 Ogos 2011 jam lebih kurang 2.05 petang, di Tandas Wad 6C, Bilik No. 28, Hospital Serdang, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu Methamphetamine sejumlah berat 614.36 gram dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[2] On 26 August 2011 at about 11pm, Insp Sherman Jackson Jon Bosco ('SP2') was on duty with his team at the Kuala Lumpur International Airport, when he stopped the appellant at the arrival hall. A physical examination of the appellant revealed nothing incriminating.

[3] On 27 August 2011 at about 12.30am, the appellant was sent to the Hospital Serdang. At the hospital, the appellant underwent an X-ray examination. Upon review of the X-ray film, Dr Harmit Singh a/l Tarlock Singh ('SP11') confirmed that there were many foreign objects in the appellant's abdomen. The appellant was detained at Ward 6C. Three police personnel were on duty to guard the appellant at the hospital. They were Kpl Mohd Sazman bin Abdullah ('SP3'); L/Kpl Hamad Rahman bin Zainal ('SP4') and L/Kpl Rosli bin Ibrahim ('SP8').

[4] While SP3 was on duty on 27 August 2011, the appellant excreted 22 capsules and 25 capsules at 6am and 7am, respectively. On the same day when SP4 was on duty, the appellant excreted 18 capsules at 12pm and 17 capsules at 3.30pm. And on 28 August 2011 when SP8 was on duty, the appellant excreted one capsule at 2.05pm.

[5] The capsules were handed over by SP3, SP4 and SP8 to Insp Mohd Zulkifli bin Rasid ('SP10') who then sent them to the chemist for analysis.

[6] Upon analysis, the chemist, Dr Vanitha a/p Kunalan ('SP5') confirmed that the capsules contained 614.36g methamphetamine. Methamphetamine is listed under the First Schedule to the Dangerous Drugs Act 1952 ('the Act').

[7] Having considered the evidence adduced by the prosecution on a maximum evaluation, the learned trial judge found that a prima facie case has been made out. The appellant was called upon to enter his defence.

A THE DEFENCE

[8] The appellant, a Nigerian, gave evidence under oath. In gist, his testimony was as follows.

B

[9] In 2010 a friend of his, named Obina who had been in Malaysia for over three years suggested that he continue his studies in Malaysia. Obina made the arrangements for him to study in Malaysia while his uncle Oliver provided the finance and other travelling needs, including his student visa.

C

[10] The appellant came to Malaysia in 2010 where he enrolled and started studying in College Cyberlynx at Jalan Pudu, Kuala Lumpur. In August 2011, he returned to Nigeria. While he was in Nigeria, Obina contacted him and informed him that Obina had left one bag in Nigeria and requested the
D appellant to bring the bag to Malaysia.

[11] The appellant agreed to help Obina but he told Obina that his flight back to Malaysia would be delayed as his uncle Oliver was not able to raise money for his air fare. Obina immediately agreed to give him a loan of
E RM2,000 to purchase his ticket which the appellant was supposed to repay when his uncle send him the money to Malaysia later.

[12] While he was in Lagos, Nigeria, the appellant went to a hotel as directed
F by a friend of Obina to collect Obina's bag. On the last day before he returned to Malaysia, Obina's friend came to the hotel and brought a bag along with him. He took the bag from Obina's friend and the friend asked him to open the bag first.

G **[13]** The appellant opened the bag and found it to contain clothes, shoes and a number of capsules which were as big as his thumb. The capsules were wrapped in plastic. He was unable to see the contents of the capsules. He asked Obina's friend what the capsules were and he was informed that only Obina knew the contents. When he wanted to take the bag, Obina's friend prevented
H him, telling him to only take the capsules and nothing else. He refused, but Obina's friend immediately contacted Obina who was in Malaysia and requested the appellant to speak with Obina.

[14] Obina then informed the appellant to leave the bag behind and to just
I bring the capsules back. He asked Obina what were in the capsules and Obina informed him that the capsules were chemicals used for treatment of hair loss. The appellant was required to swallow the capsules in order to bring the capsules safely to Obina. The appellant was not agreeable at first as he was afraid that swallowing them might have fatal consequences.

[15] Obina told him that his friend would teach the appellant how to swallow the capsules and assured him that it was not dangerous. Obina's friend then bought some vegetable soup, placed the capsules together with the soup and swallowed ten capsules. After the appellant noticed that nothing happened to Obina's friend, he agreed to swallow the capsules.

[16] The appellant could not remember how many capsules he swallowed. When he was arrested by the police, the appellant told the police about Obina and that he had Obina's phone number in his mobile phone but the police refused to investigate further.

Findings at the end of the defence case

[17] The learned trial judge found the defence improbable and hard to believe. The learned trial judge further found that the appellant's version of Obina was fictitious and a mere denial. The existence of Obina and Obina's friend were not put to SP2 and/or to SP10. Neither was the appellant's version that he had Obina's phone number put to SP10. Obina and Obina's friend were only raised during the defence case.

[18] The learned trial judge found that the appellant had failed to rebut the presumption of possession under s 37(d) of the Act and failed to raise a reasonable doubt on the prosecution's case. The appellant was thus convicted and sentenced to death, hence the appeal.

THE APPEAL

[19] Before us, learned counsel canvassed only one ground of appeal, namely on the identity of the drug exhibits. It was the contention of learned counsel that the drug exhibits were in doubt as the gross weight given by SP5 was about 30g more than the total gross weight given by SP3, SP4 and SP8.

[20] Learned counsel highlighted the evidence of SP3 who testified that the gross weight of the 22 capsules was 348g while the 25 capsules weighed 407g. As for SP4, he stated that the 18 capsules weighed 300g whilst the 17 capsules weighed 287g.

[21] As for SP8, his evidence showed that the gross weight of one capsule was 15g.

[22] Based on the evidence of SP3, SP4 and SP8, learned counsel submitted that the total weight of the drugs in the 83 capsules was 1357g whereas the chemist, SP5 testified that the weight of the capsules was 1381.1244g. Learned counsel cited the case of *Tan Yew Choy v Public Prosecutor* [2010] 5 MLJ 212;

A [2009] 4 CLJ 245 to submit that a reasonable doubt has been created as to whether the drugs recovered from the appellant were the same one analysed by the chemist.

B **[23]** Learned counsel also submitted that from the evidence of SP10, the drugs were recovered from the appellant on 26 August 2011 whereas the date in the charge was 27 August 2011. This, argued learned counsel, raised a doubt whether the drugs exhibits in the instant case were mixed up with exhibits from another case. In this regard, learned counsel highlighted the following evidence of SP10 in cross-examination (appeal record Vol 3 p 264):

C

> S: Kenapa daripada 26/8/2011 kamu hanya hantar dadah tersebut ke
>
> Jabatan Kimia Malaysia pada 22/9/2011? Lebih kurang 1 bulan kamu simpan dadah tersebut?
>
> J: Sebagai I.O. saya juga menyiasat kes-kes lain dan saya juga terlibat

D

> dengan perbicaraan kes lain dan saya juga terlibat dengan tugasan yang lain sebagai pegawai polis ...

OUR DECISION

E

[24] The law is settled that the discrepancy in the gross weight of the drugs *ipso facto* should not cast a doubt on its identity. Suffice if we quote the following judgment of Richard Malanjum CJ (Sabah and Sarawak) in *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 wherein at

F p 334 (MLJ); p 659 (CLJ) His Lordship states:

> [27] ... we would say that discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any

G break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence (see *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75; [1979] 1 LNS 100; *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168; [1974] 1 LNS 33).

H

[25] Applying the above principle to the instant appeal, we found that there was no break in the handling or custody of the exhibits as to amount to a break in the chain of evidence. Our finding is based on the following evidence.

I **[26]** SP3 stated that when he was on duty, the appellant excreted 22 capsules and 25 capsules. The recovery of the 22 and 25 capsules from the appellant was recorded in the search lists, exhs P17 and P18. The number of capsules excreted by the appellant as stated in the oral evidence of SP3 and in the search lists was consistent in SP3's police reports, exhs P19 and P20. The handing over of the

22 capsules and 25 capsules from SP3 to the investigating officer, Insp Mohd Zulkifli bin Rasid ('SP10') was evidenced by the hand over lists, exhs P21 and P22.

[27] As for SP4, he recorded the capsules recovered from the appellant, namely 18 capsules and 17 capsules in the search lists, exhs P23 and P24, respectively. The police reports lodged by SP4, exhs P25 and P26 recorded the same number of capsules excreted by the appellant. The handing over of the 18 capsules to SP10 can be seen at exh P32 and the 17 capsules at exh P33.

[28] Only one capsule was excreted by the appellant when SP8 was on duty and this excretion was recorded in the search list, exh P36 and in the police report lodged by SP8 ('exh P37'). The drug exhibit was handed over to the investigating officer, SP10 as evidenced by exh P39.

[29] SP10 confirmed that he received 22 capsules and 25 capsules from SP3 and he marked all the 47 capsules which were placed inside four plastic packets marked Z1 to Z4. Z1 and Z2 contained 11 capsules each. The third plastic packet Z3 had ten capsules and the fourth plastic packet, Z4 contained 15 capsules.

[30] SP10 also confirmed receipt of 18 capsules and 17 capsules from SP4 through the hand over lists, exhs P32 and P33. The 17 capsules were put in a plastic marked Z5 and the 18 capsules in a plastic marked Z6. The one capsule received from SP8 through the hand over list, exh P38, was placed in a plastic packet marked Z7 by SP10.

[31] All the capsules were also individually marked by SP10 by putting his signature. The plastic packets containing the capsules were kept by SP10 in his steel cabinet which was locked. No one else except SP10 had access to the key and the steel cabinet. On 22 September 2011, SP10 sent the drug exhibits in a sealed PDRM box, marked ZL to the chemist, SP5.

[32] SP5 confirmed receipt of the box marked ZL from SP10 with the contents of plastic packets marked Z1 until Z7. SP5 confirmed that she analysed the capsules in Z1 until Z7 and found them to contain methamphetamine totalling 614.36g.

[33] Given the above, we found no merits in the appeal. We similarly found no merits in the argument of learned counsel in respect of the date 26 August 2011 alluded to in the cross-examination of SP10.

[34] The documentary evidence, namely the search lists, the police reports and the hand over lists all bore the date of 27 August 2011 and 28 August 2011. None had the date of 26 August 2011. The only occasion when the date 26 August 2011 appeared was in the cross-examination as adverted to above. We noted that the date was not mentioned by SP10 but it was in the question posed by learned counsel. There was no basis to find that the drug exhibits analysed by the chemist and which formed the subject matter of the charge against the appellant were not the same ones that were excreted by him.

[35] Considering the evidence in totality, we found that the prosecution had proved beyond reasonable doubt that the appellant had mens rea possession of, and was trafficking in the dangerous drugs under s 2 of the Act, by carrying and concealing the drugs in his stomach. In our judgment, the conviction of the appellant was safe. We therefore unanimously dismissed the appeal and we affirmed the conviction and sentence of the High Court.

Appeal dismissed; conviction and sentence of High Court affirmed.

Reported by Dzulqarnain Ab Fatar